# United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

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Memorandum

To: Director, Bureau of Land Management

Through: Assistant Secretary, Land and Minerals Management

From: Associate Solicitor, Energy and Resources

Subject: Wilderness Review of Lands Placed Under Bureau of Land Management Administration After October 21, 1976

By memorandum dated July 17, 1985, you asked us whether the Secretary of the Interior may study for possible preservation as wilderness (1) lands acquired by the United States and administered by the Bureau of Land Management after October 21, 1976 or (2) land restored to public land status after the same date. October 21, 1976, is the day Congress enacted the Federal Land Policy and Management Act. We conclude that the Secretary has this authority.

## Discussion

### 1. The Extent of Mandatory Wilderness Review

Section 603(a) of the Federal Land Policy and Management Act, 43 U.S.C. § 1782(a)(1982)(FLPMA), states that "the Secretary shall review [for possible preservation as wilderness] those roadless areas of five thousand acres or more. . . of the public lands, identified during the inventory required by section 201(a) of this Act as having wilderness characteristics. . . ." The provision removes any discretion from the Secretary when he has identified in the inventory public lands having wilderness characteristics. They must be reviewed for possible wilderness preservation.

The mandate found in section 603(a) is limited, however. The public lands subject to the provision are those "identified during the inventory required by section 201(a) of the Act as having wilderness characteristics." The predicate of the

inventory, practically speaking, renders section 603(a)'s mandate inapplicable to lands not included in the inventory but subsequently acquired or restored, regardless of whether they have wilderness characteristics.[1] As we stated in 1982:

> [T]he specific directive of 603 is for a one-time review of lands with wilderness characteristics based on the initial inventory of lands conducted by BLM. The Secretary is not required to conduct a wilderness review of restored (or otherwise acquired) lands that come under BLM management after the date of the Act.

Memorandum from Associate Solicitor, Energy and Resources to Director, Bureau of Land Management, "Wilderness Review of Lands Placed Under BLM Administration after October 21, 1976," at 4 (March 16, 1982). Our opinion remains unchanged: the Secretary is under no mandatory duty to review public lands acquired after the inventory for possible wilderness preservation.

2. Secretary's Discretion to Review After-Acquired Public Lands for Wilderness Preservation

Despite the absence of a mandate to review after-acquired public lands for possible wilderness preservation, the Secretary nonetheless enjoys discretion to do so. The discretion is conferred primarily by section 302 of FLPMA, and buttressed by section 202 of that Act.

Section 302(a) of FLPMA directs the Secretary to "manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him. . . ." 43 U.S.C. § 1732(a)(1982). The governing principle of multiple use is defined by the statute broadly:

> The term "multiple use" means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments

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[1] As a practical matter, BLM did not conduct an inventory of all public lands on October 21, 1976. This occurred between 1976 and 1978. BLM may have included some lands acquired or restored to public lands status after FLPMA's enactment in its wilderness inventory. These are properly subject to wilderness review since they would meet all the criteria of section 603(a) which speaks of "inventory" and not the date of FLPMA's enactment. What we are addressing here are essentially those lands acquired or restored after the wilderness inventory. We will use the term "after-acquired public lands" for these lands.

> in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

Section 103(c), FLPMA; 43 U.S.C. § 1702(c)(1982)(emphasis added). As the emphasized language discloses, multiple use management envisions instances when the Secretary will manage public lands for a dominant use, such as wilderness. While reviewing public lands for possible wilderness preservation and managing them accordingly is use of the land for less than all its resources, the statute expressly permits this.

Reinforcing the Secretary's authority to not only review, but to preserve public lands' wilderness characteristics are other provisions of FLPMA. Section 302(b) directs the Secretary to "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b)(1982). Moreover, the land use planning provisions of section 202 of FLPMA underline the Secretary's broad authority to manage public lands for any number of uses, including wilderness. 43 U.S.C. § 1712(c)(1),(4) and (7)(1982). Additionally, reviewing public lands for wilderness preservation and protecting those values, as a mode of multiple use management, is consistent with Congress' declared policy in passing FLPMA. Specifically, section 101(a)(8) of FLPMA declares, as a matter of national policy, that the Secretary shall "preserve and protect certain public lands in their natural condition." 43 U.S.C. § 1701(a)(8)(1982).

The one court to consider the question also agrees that FLPMA's provisions governing multiple use and land use planning afford the Secretary discretion to review and manage for possible wilderness preservation public lands falling outside section 603(a)'s scope. Specifically, in Sierra Club v. Watt, ___ F. Supp. ___, No. S-83-035 LKK, (E.D. Cal. 1985), the district court held that sections 302 and 202 plainly gave the Secretary a choice whether to review for wilderness preservation roadless areas under 5,000 acres. Slip opinion at 8 n.7, 84 and 86-87. The holding's significance is that section 603(a) of FLPMA only mandated wilderness review of roadless areas over 5,000 acres.

Indeed, the court characterized the Secretary's authority under FLPMA to engage in wilderness review of public lands not only as discretionary, but also broad. Id. at 84 and 86-87.

As the Sierra Club v. Watt decision instructs, the fact that wilderness review of certain categories of public lands is not mandated by section 603(a) does not preclude the Secretary from choosing to do so. Section 302 of FLPMA, as underscored by section 202 of the statute, gives the Secretary that choice.

3. Coordination with Existing Wilderness Review

Your memorandum also advanced the proposition that where after-acquired public lands adjoin or are intermingled with an area under wilderness review pursuant to section 603(a) of FLPMA, the after-acquired lands can be reviewed for wilderness preservation under that authority. The proposition closely parallels the discredited view that the Secretary could under section 603(a) review for wilderness preservation public lands possessing wilderness characteristics only by virtue of their contiguity to other wilderness. See Don Coops, et al., 61 IBLA 300 (1982). More important, the proposition and the bootstrap inherent in it are unnecessary. Sections 302 and 202 of FLPMA provide the Secretary authority to review after-acquired public lands for possible wilderness preservation. Equally important, how the Secretary chooses to conduct wilderness review of adjoining or intermingled after-acquired public lands is one committed to his discretion. The Secretary may consolidate the wilderness review of those tracts with on-going efforts under section 603(a) of FLPMA. We note that if a consolidated effort found an entire area unsuitable for wilderness preservation, the Secretary may be faced with releasing the consolidated tracts from further wilderness review differently. Departmental policy requires the Secretary to submit to the President and Congress all recommendations arising from his wilderness review under section 603(a) of FLPMA. A similar policy constraint does not exist for areas found unsuitable through wilderness review under sections 302 and 202 of FLPMA. The Secretary could release these areas from further wilderness review without presidential or congressional action.

Conclusion

The Secretary may, if he chooses, review for possible preservation as wilderness lands acquired and administered by the Bureau of Land Management or restored to public land status after FLPMA became law.

Please do not hesitate to contact either Paul Smyth (343-4036) or Allan Brock (343-4325), if you have any questions about this memorandum.

Keith E. Eastin
Associate Solicitor
Energy and Resources

cc: Docket DER/RF DER/Land Use DER/ABrock DER/PSmyth
bcc: BLM (200), (310), (340) and (342)